



THE CRISIS OF THE WTO DISPUTE SETTLEMENT SYSTEM: JUDICIALIZATION, LEGITIMACY AND INSTITUTIONAL REFORM

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ABSTRACT

This article examines the crisis of the World Trade Organization Dispute Settlement System, focusing on the paralysis of the Appellate Body, the increasing judicialization of trade adjudication, questions of institutional legitimacy, and the need for reform. The WTO dispute settlement mechanism was originally designed to provide a rules-based alternative to power-based trade relations. However, the non-functioning of the Appellate Body since December 2019 has weakened the finality, predictability and enforceability of WTO dispute settlement. The article argues that the crisis is not merely procedural, but reflects a deeper tension between judicial authority and state sovereignty. It also evaluates interim alternatives such as Article 25 arbitration and the Multi-Party Interim Appeal Arbitration Arrangement. Although these mechanisms provide temporary solutions, they cannot fully replace a universally accepted appellate system. The article concludes that sustainable reform requires both procedural restructuring and renewed political consensus among WTO members.

Introduction

The World Trade Organization dispute settlement system was established to ensure that international trade disputes are resolved through legal rules rather than political pressure or economic power. Its creation reflected the broader development of the post-war international legal order, where states increasingly accepted legal and institutional mechanisms for managing conflicts. The WTO's Dispute Settlement Understanding created a structured system based on panels, appellate

review, compulsory jurisdiction and reverse consensus. This design was intended to make WTO rules more effective and to prevent powerful states from unilaterally determining the outcome of trade disputes.[1] For many years, the WTO dispute settlement system was regarded as one of the most effective international adjudicatory mechanisms. It allowed both developed and developing countries to challenge violations of WTO obligations and to obtain legally reasoned decisions. The Appellate Body played a central role in



this system by reviewing legal interpretations made by panels and contributing to consistency in WTO jurisprudence. Through this mechanism, the WTO became not only a forum for negotiation but also a legal institution capable of enforcing trade commitments.

However, the system entered a serious crisis when appointments to the Appellate Body were blocked, mainly due to objections raised by the United States. By December 2019, the Appellate Body could no longer function because it lacked the minimum number of members required to hear appeals. This created the problem known as “appeal into the void”, where a losing party may appeal a panel report even though no functioning appellate body exists to hear the appeal. As a result, the adoption and enforcement of panel reports can be indefinitely delayed.[2] The crisis has raised broader questions about the legitimacy of the WTO dispute settlement system. Some members argue that the Appellate Body exceeded its mandate by engaging in judicial law-making, creating de facto precedent, issuing unnecessary legal interpretations and reviewing matters that should remain within the policy space of member states. Others argue that the Appellate Body was essential for preserving legal certainty and that its paralysis weakens the rules-based multilateral trading system.

The Development and Importance of WTO Dispute Settlement

The WTO dispute settlement system differs from many other international legal mechanisms because of its relatively compulsory and automatic character. Under the Dispute

Settlement Understanding, a member state may bring a claim when it believes that another member has violated WTO rules. If consultations fail, a panel is established to examine the dispute. The panel report may then be appealed on issues of law before the Appellate Body. Once adopted by the Dispute Settlement Body, the ruling becomes binding on the parties.[3] This system was designed to reduce unilateral retaliation and to strengthen confidence in multilateral trade governance. Instead of relying on political bargaining alone, states could rely on legal procedures and reasoned decisions. The mechanism was particularly important for smaller and developing economies, because it provided them with a formal means to challenge trade measures imposed by larger economies.

The Appellate Body was a key innovation of the WTO system. Its function was not to re-examine factual findings but to review legal questions and legal interpretations made by panels. In practice, however, the Appellate Body gradually became more influential. Its reports clarified the meaning of WTO agreements, developed interpretive principles and contributed to coherence in WTO law. This development increased legal predictability but also generated criticism. Some members believed that the Appellate Body was moving beyond dispute resolution and creating new obligations not explicitly agreed by members. A structural limitation of the system is that the Appellate Body does not have a clear remand authority. In domestic legal systems, appellate courts often have the power to send a case back to a lower court when further factual



findings are necessary. In the WTO system, however, the Appellate Body can uphold, modify or reverse panel findings, but it cannot formally remand a case to the panel. This creates difficulties when a panel has not made sufficient factual findings for the Appellate Body to complete the legal analysis.[4]

Thus, even before the formal paralysis of the Appellate Body, the system contained procedural weaknesses. The crisis that began with appointment blockage revealed and intensified these underlying problems.

Judicialization and the Appellate Body Crisis

Judicialization refers to the process by which legal institutions become more court-like and increasingly influential in resolving political or economic disputes. In the WTO context, judicialization means that trade conflicts are interpreted and resolved through legal reasoning by panels and the Appellate Body rather than through political negotiation alone. The WTO system was always intended to be legalistic to some extent. Its goal was to create predictability and discipline in international trade. However, the Appellate Body's practice became controversial because some members believed that it interpreted WTO agreements too broadly. Criticisms included the claim that the Appellate Body treated its previous reports as precedent, issued unnecessary statements, reviewed domestic law too extensively and failed to respect the 90-day deadline for appeals.[5]

These concerns were particularly sensitive in cases involving sovereignty-related matters. For example, disputes

concerning national security exceptions under GATT Article XXI demonstrated the difficulty of balancing legal review with state sovereignty. Some states argue that national security matters should be self-judging and not subject to WTO adjudication. Others maintain that if national security exceptions are completely self-judging, states may abuse them to justify protectionist measures.[6] This tension shows why the crisis is not only administrative. It is also conceptual and political. A dispute settlement system must be sufficiently independent to enforce rules, but it must also remain acceptable to the states that created it. If adjudicators are perceived as exceeding their mandate, members may withdraw political support. If adjudication becomes too weak, the system loses its ability to enforce obligations. In this sense, the Appellate Body crisis reflects a conflict between two forms of legitimacy. The first is legal legitimacy, based on consistency, independence and rule-based adjudication. The second is political legitimacy, based on member consent, mandate control and respect for sovereignty. A sustainable WTO dispute settlement system must balance both.

Chronology and Effects of the Crisis

The WTO Appellate Body crisis developed gradually. Between 2017 and 2019, the blockage of appointments led to a decline in the number of Appellate Body members. In December 2019, the Appellate Body ceased to function because it no longer had the required three members to hear appeals. This marked a turning point in WTO dispute settlement. The most direct consequence



was the emergence of “appeals into the void.” When a party appeals a panel report in the absence of a functioning Appellate Body, the report cannot be adopted by the Dispute Settlement Body. This prevents the dispute from reaching final legal resolution. In practical terms, a losing party can delay compliance simply by filing an appeal that cannot be heard.[7] The indirect effects are equally serious. Members may become less willing to bring disputes if they know that the final decision may not be enforceable. They may prefer bilateral settlement, political bargaining or unilateral trade measures. This weakens the WTO’s public function of producing authoritative legal interpretations and maintaining systemic predictability.

By 2022, the consequences of the crisis were clearly visible. The number of newly initiated disputes decreased, panel activity became more limited, and settlement before final adjudication became more common. While settlement can be useful in individual cases, excessive reliance on private settlement reduces the development of WTO jurisprudence and limits transparency for other members. The crisis also affects compliance incentives. If a member knows that an adverse panel report can be appealed into the void, the pressure to comply decreases. This undermines the credibility of WTO rules. A dispute settlement system without finality cannot effectively transform legal rights into practical remedies.

Legitimacy, Member Participation and Reform Difficulty

The legitimacy of the WTO dispute settlement system depends not only on legal design but also on member

participation. One important problem is that WTO members do not use the dispute settlement system equally. A relatively small group of members are frequent users, while many members rarely or never initiate disputes. This unequal participation creates political difficulties for reform.[8] Members that regularly use the system have strong interests in restoring appellate review and preserving enforceable rulings. Members that rarely litigate may support reform rhetorically but may not invest significant political energy in negotiating institutional change. This creates a collective action problem: many members benefit from a functioning rules-based system, but only a smaller group bears the costs of defending and reforming it.

The same issue appears in relation to the Multi-Party Interim Appeal Arbitration Arrangement. The MPIA was created by some WTO members as a temporary alternative to the Appellate Body. It allows participating members to use arbitration under Article 25 of the DSU to preserve appellate review among themselves. However, participation remains limited. Since not all WTO members have joined the MPIA, it cannot provide a universal solution. The limited membership of the MPIA shows that the crisis is also a crisis of political coalition. Interim solutions can preserve legal finality for participating members, but they risk fragmenting the dispute settlement system. If some members have access to appellate review while others do not, the WTO system may become uneven and less coherent. Therefore, legitimacy must be understood in a broad sense. It includes



procedural fairness, legal predictability, member consent, institutional accountability and equal access. Reform must address all these dimensions.

Interim Alternatives: Article 25 Arbitration and MPIA

Article 25 of the DSU allows WTO members to use arbitration as an alternative means of dispute settlement. In the current crisis, Article 25 has become important because it can be used to create an appeal-like mechanism. The MPIA is based on this idea. It allows participating members to preserve a two-tier dispute settlement process even while the Appellate Body remains inactive.[9] The MPIA has several advantages. It demonstrates that appellate review can continue through existing WTO rules. It can also be more flexible and efficient than the original Appellate Body procedure. For example, MPIA procedures may limit the length of submissions, focus only on necessary issues and encourage faster resolution. In this sense, it responds to some criticisms that the Appellate Body was too slow or too expansive.

However, the MPIA also has limitations. First, it applies only among participating members. If a dispute involves a non-participating member, the MPIA cannot guarantee appellate review. Second, because it is temporary and plurilateral, it does not fully restore the authority of the multilateral system. Third, reliance on interim mechanisms may reduce pressure for a permanent solution. Article 25 arbitration and the MPIA therefore provide useful short-term tools, but they cannot replace a fully functioning WTO appellate mechanism. They may prevent complete collapse in

some disputes, but they do not solve the deeper legitimacy and political problems underlying the crisis. A lasting solution requires reform of the DSU and renewed agreement among WTO members about the proper role of appellate review. Members must clarify whether Appellate Body reports should have persuasive or precedent-like value, how deadlines should be enforced, whether remand authority should be introduced, and how adjudicators should avoid unnecessary legal findings.

Reform Options and Institutional Balance

Reform of the WTO dispute settlement system must pursue two goals at the same time: restoring legal finality and rebuilding political trust. If reform focuses only on legal efficiency, it may fail to address concerns about judicial overreach. If it focuses only on political control, it may weaken the independence and effectiveness of adjudication. One possible reform is to clarify the mandate of appellate review. The Appellate Body should focus strictly on issues of law and avoid making unnecessary findings. This could respond to concerns about judicial activism and obiter dicta. At the same time, appellate review must remain strong enough to correct legal errors and preserve consistency. Another reform is to introduce limited remand authority. When the appellate level reverses a panel's legal interpretation but cannot complete the analysis due to insufficient factual findings, it should have the ability to send the case back to the panel. This would improve completeness and avoid unresolved disputes. A third reform concerns timelines. The 90-day deadline for appellate review has been a major



source of criticism. The system should either make the deadline more realistic or introduce clearer procedural rules to ensure compliance. Efficiency is important because delayed justice weakens confidence in the system. A fourth reform is to strengthen member control through political and legislative mechanisms. WTO members may use authoritative interpretations to clarify disputed provisions. Committees may also play a stronger role in addressing legal uncertainty before disputes escalate. This would help reconnect adjudication with negotiation. Finally, reform must expand participation. Developing countries and less frequent users should be included in reform discussions. Capacity-building, legal assistance and procedural simplification may help more members benefit from dispute settlement. A system used mainly by a small group of powerful or legally sophisticated members cannot fully claim inclusive legitimacy.

General Reflection on the Crisis

The Appellate Body crisis is not simply a technical failure of appointments. It is a warning about the fragility of rules-based international trade governance. The WTO dispute settlement system depends on law, but it also depends on political acceptance. If powerful members refuse to support adjudication, legal design alone cannot preserve the system. At the same time, abandoning judicialized dispute settlement would be dangerous. Without enforceable rules, international trade may return to power-based bargaining, unilateral retaliation and protectionist escalation. This would harm not only smaller economies but also the stability

of the global trading system as a whole. The most important lesson is that adjudication and negotiation should not be treated as separate functions. WTO law must be interpreted by adjudicators, but politically sensitive questions also require member engagement. The system should create channels through which legal uncertainty can return to political discussion when necessary. This does not mean weakening law; rather, it means making law institutionally sustainable. The WTO needs a dispute settlement system that is independent but not detached, authoritative but not uncontrolled, efficient but not superficial, and legalistic but politically legitimate. Such balance is difficult, but it is necessary if the WTO is to remain relevant in a period of geopolitical tension, digital trade, environmental regulation and economic fragmentation.

Conclusion

The WTO dispute settlement crisis reveals a deep institutional tension between judicial authority and state sovereignty. The paralysis of the Appellate Body has weakened the finality, predictability and enforceability of WTO dispute settlement. Appeals into the void have created opportunities for delay, reduced incentives for compliance and encouraged members to rely more on political or bilateral solutions. The crisis is also connected to concerns about judicialization. Some members believe that the Appellate Body exceeded its mandate by creating precedent-like effects, issuing unnecessary interpretations and entering sovereignty-sensitive areas. Others argue that without appellate review, the WTO cannot maintain a credible rules-



based trading system. Both positions reflect legitimate concerns.

Interim mechanisms such as Article 25 arbitration and the MPIA provide partial solutions. They show that appellate review can continue in a more flexible form, but their limited membership prevents them from replacing a universal appellate mechanism. Therefore, they should be viewed as temporary instruments rather than permanent substitutes. Sustainable reform requires procedural and political solutions. The WTO should clarify the appellate mandate, consider limited remand authority, improve timelines,

strengthen member control over interpretation and expand participation among all members. Most importantly, reform must rebuild trust. Without renewed political consensus, even the best legal design will remain fragile. In conclusion, the future of WTO dispute settlement depends on restoring a balance between law and politics. A functioning system must protect legal certainty while respecting the concerns of member states. Only such a balanced reform can preserve the WTO's role as a central institution of the rules-based multilateral trading system.

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